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APR 20 2007

In re Application of	:	OFFICE OF PETITIONS
Imada, et al.	:	
Application No. 10/769,488	:	DECISION ON PETITION
Filed: January 29, 2004	:	
Attorney Docket No. 5187/DBP/A400	:	

This is a decision on the petition under 37 CFR 1.10(d) first filed on March 5, 2007.

The petition is **dismissed**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.10".

The instant petition was filed to correct what petitioner believed was an incorrect filing date accorded the above-cited application. Petitioner maintains that the correct filing date for the application should be January 30, 2004, not the currently accorded date of January 29, 2004. In support thereof, petitioner filed an a copy of Express Mail label, tracking number EV351235493US with the date-in as January 29, 2004. Petitioner maintains that "date-in" should have been January 30, 2004.

Section 1.10(d) of the Title 37 of the Code of Federal Regulations indicates if a showing is made that the "date-in" on the Express Mail label was incorrectly entered or omitted by the United States Postal Service, a petition to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the United States Postal Service, provided that:

- (1) the petition is filed promptly after the person becomes aware that the Office has accorded or will accord a filing date based upon an incorrect entry by the USPS;
- (2) the number on the Express Mail mailing label was placed on a paper(s) or fee(s) that constitute the correspondence prior to the original mailing by Express Mail; and
- (3) the petition includes a showing which established, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in the "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within

one business day of the deposit of the correspondence in the "Express Mail Post office to Addressee" service of the USPS.

The instant petition does not satisfy the requirements of items (1) and (3) above.

As to item (1), petitioner has not explained why the petition to correct filing date was filed more than three years after the application was accorded a filing date. A successful petition under 37 CFR 1.10(d) requires that the petition be filed promptly after petitioner becomes aware that the application has been accorded an incorrect filing date. The renewed petition must explain when petitioner discovered the alleged filing date error and how soon thereafter the petition to correct the filing date was filed.

As to item (3), Section 513 of the *Manual of Patent Examining Procedure*, provides in pertinent part, that:

The showing under 37 CFR 1.10(d) must be corroborated by (1) evidence from the USPS, or (2) evidence that came into being after deposit and within one business day of the deposit of the correspondence as "Express Mail." Evidence from the USPS may be the "Express Mail" Corporate Account Mailing Statement. Evidence that came into being within one day after the deposit of the correspondence as "Express Mail" may be in the form of a log book which contains information such as the "Express Mail" number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of entry in the log.

The reason the Office considers correspondence to have been filed as of the date of deposit as "Express Mail" is that this date has been verified by a disinterested USPS employee, through the insertion of a "date-in," or other official USPS notation, on the "Express Mail" mailing label. Due to the questionable reliability of evidence from a party other than the USPS that did not come into being contemporaneously with the deposit of the correspondence with the USPS, 37 CFR 1.10(d) specifically requires that any petition under 37 CFR 1.10(d) be corroborated either by evidence from the USPS, or by evidence that came into being after deposit and within one business day after the deposit of the correspondence as "Express Mail."

A petition alleging that the USPS erred in entering the "date-in" will be denied if it is supported only by evidence (other than from the USPS) which was:

(A) created prior to the deposit of the correspondence as "Express Mail" with the USPS (e.g., an application transmittal cover letter, or a client letter prepared prior to the deposit of the correspondence); or

(B) created more than one business day after the deposit of the correspondence as "Express Mail" (e.g., an affidavit or declaration prepared more than one business day after the correspondence was deposited with the USPS as "Express Mail").

On the other hand, a notation in a log book, entered after deposit by the person who deposited the correspondence as "Express Mail" within one business day of such deposit, setting forth the items indicated above, would be deemed on petition to be an adequate showing of the date of deposit under 37 CFR 1.10(d)(3).

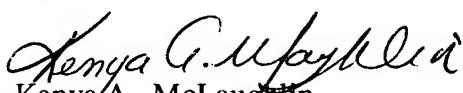
Relative to item (3) above, petitioner's docket entry corroborating the mailing of the subject application was not found with instant petition. The docket entry is material to satisfying item (3) above. The undersigned must be able to review the docket entry to determine if it is of any probative value in light of the MPEP § 513 cited above. The copy of the relevant docket entry must accompany any renewed petition filed.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions  
Commissioner for Patents  
Box 1450  
Alexandria, VA 22313-1450

By facsimile: (571)273-8300  
Attn: Office of Petitions

Telephone inquiries concerning this decision should be directed to the undersigned at (571) 272-3222

  
Kenya A. McLaughlin  
Petitions Examiner  
Office of Petitions